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CITATIONS

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626078—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 788

HARRY BRIDGES, PETITIONER

v.

I. F. WIXON, AS DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion in the circuit court of appeals of Circuit Judge Wilbur (R. 7770–7793), the concurring opinion of Circuit Judge Stephens (R. 7793–7794), and the dissenting opinion of Circuit Judge Healy (R. 7794–7809) are reported at 144 F. (2d) 927.[1] The opinion of Judge Stephens

[1] The appeal was heard before a bench of five circuit judges (R. 7770). Judge Mathews agreed with Judges Wilbur and Stephens (R. 7794); Judge Garrecht agreed with the dissent (R. 7809).

(R. 7811–7812) rendered in connection with the denial of a petition for rehearing is reported at 144 F. (2d) 944.[2] The opinion and order of the district court (R. 723–759) are reported at 49 F. Supp. 292.

JURISDICTION

The judgment of the circuit court of appeals was entered June 26, 1944 (R. 7810). A petition for rehearing was denied September 27, 1944 (R. 7811). The petition for a writ of certiorari was filed December 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, by the tests applicable in a habeas corpus proceeding instituted to secure collateral review of a deportation order, the evidence adequately sustained the Attorney General's findings that petitioner, after entering the United States, was a member of the Communist Party and affiliated with that Party and with the Marine Workers Industrial Union.

2. Whether petitioner was denied due process by reason of alleged abuses committed in the institution and conduct of the deportation proceeding.

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[2] Judge Stephens, on November 1, 1944, filed an amendment to his opinion (R. 7815).

3. Whether the deportation statute as construed and applied to petitioner denies him freedom of speech and association in violation of his constitutional rights.

STATUTES INVOLVED

Sections 1 and 2 of the Act of October 16, 1918 (c. 186, 40 Stat. 1012), as amended by the Act of June 5, 1920 (c. 251, 41 Stat. 1008–1009) and the Act of June 28, 1940 (c. 439, Title II, sec. 23, 54 Stat. 673, 8 U. S. C. 137), provide, in pertinent part, as follows:

> That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * *
>
> (c) Aliens * * * who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States * * *.
>
> * * * * *
>
> (e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, is-

sue, or display, any written or printed matter of the character described in subdivision (d) [advising, advocating or teaching the overthrow by force or violence of the Government of the United States].

For the purpose of this section: (1) the giving, loaning or promising of money or any thing of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning or promising of money or any thing of value to any organization, association, society, or group, of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation.

SEC. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General,[3] be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917.[4] The provisions of this sec-

[3] By Reorganization Plan No. V, effective June 14, 1940 (54 Stat. 230, 1238, 5 U. S. C., fol. 133t; 5 U. S. C. 133v), the administration of the immigration and naturalization laws was transferred from the Secretary of Labor to the Attorney General.

[4] The Act of February 5, 1917 (c. 29, 39 Stat. 874–898, 8 U. S. C. 101, et seq.).

> tion shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

Section 19 of the Act of February 5, 1917 (c. 29, 39 Stat. 889, 8 U. S. C. 155) provides, in pertinent part, as follows:

> In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.[5]

STATEMENT

Petitioner is an alien,[6] a native and citizen of Australia (R. 778–780, 7736–7737), who entered the United States in April 1920 (R. 791, 7735). He has been in the United States continuously since that time, apart from several voyages as a seaman on American vessels, the last of which occurred in 1922 (R. 791–792). In March 1938, deportation proceedings were instituted against petitioner under Section 2 of the Act of October 16, 1918, as amended by the Act of June 5, 1920

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[5] Since June 14, 1940, the immigration laws have been administered by the Attorney General. See footnote 3 (p. 4, *supra*).

[6] Petitioner has filed three declarations of intention to become a citizen (Gov. Exs. 277, R. 6070–6074; 279, R. 6089; 296, R. 7735). He allowed the first two to lapse (R. 508), and the last, which was filed on March 28, 1939, apparently is still pending.

(40 Stat. 1012, 41 Stat. 1008–1009)[7] on the ground that after his entry into the United States he had become a member of and affiliated with an organization that advised, advocated and taught the overthrow by force and violence of the Government of the United States and that caused to be written, circulated, distributed, printed, published, and displayed printed matter advising, advocating and teaching the overthrow by force and violence of the Government of the United States (R. 73–74, 503). James M. Landis, Dean of the Harvard Law School, was appointed trial examiner for the purpose of hearing the case, and hearings were

[7] Prior to its amendment by Title II, Section 23, of the Act of June 28, 1940 (c. 439, 54 Stat. 673, pp. 4–5, *supra*), Section 2 of the 1918 Act (40 Stat. 1012) read as follows:

"That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the Immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States."

The 1940 Amendment changed only the first paragraph of Section 1 of the 1918 Act, as amended by the Act of June 5, 1920 (c. 251, 41 Stat. 1008–1009). Prior to its amendment, the first paragraph read as follows: "That the following aliens shall be excluded from admission into the United States." This was amended by the 1940 Act to read: "That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:"

held from July 10 to September 14, 1939 (R. 74, 504).

On June 12, 1939, following the decision of this Court in *Kessler* v. *Strecker*, 307 U. S. 22,[8] the warrant upon which the proceedings had been instituted was amended to charge that petitioner both had been and then was a member of or affiliated with the organization described in the warrant (R. 503). At the hearings before Dean Landis, the Government claimed that petitioner was a member of or affiliated with the Communist Party of the United States, and that the party was an organization of the character described in the 1918 Act (R. 503–504, 508). Petitioner denied that he was a member of the Communist Party or had ever been a member (R. 509), and in December 1939 Dean Landis concluded that the evidence established neither that petitioner "is a member of nor affiliated with the Communist Party of the United States of America" (R. 636). Accord-

[8] In the *Strecker* case, which was decided April 17, 1939, the question was whether former membership in an organization described in the 1918 Act, which had ceased, was a ground of deportation. The Court held that it was not, stating (307 U. S. at 30) "* * * we conclude that it is the *present membership*, or *present affiliation*—a fact to be determined on evidence—which bars admission, bars naturalization, and requires deportation." (Italics as in original.) Dean Landis stated (R. 508, fn. 17) that the decision "left uncertain the particular time as of which the facts of membership, etc., have to be proved, though the inference derivable from the opinion is that the significant time is that of the issuance of the warrant of arrest."

ingly, he did not pass upon the question of whether that party was an organization within the Act (R. 497). In January 1940, the Secretary of Labor sustained Dean Landis and dismissed the proceedings against petitioner (R. 75, 139).

On June 28, 1940, Congress amended the deportation statute in question so as to provide for deportation of an alien who was "at the time of entering the United States, or has been at any time thereafter" a member of the classes of aliens specified (Act of June 28, 1940, c. 439, Title II, sec. 23, 54 Stat. 673; see pp. 3–5, *supra*). The sponsors of the amendment stated that it was designed to obviate the construction placed upon the statute by the *Strecker* case that only present membership or affiliation required deportation (86 C. R. 8343, 9031–9032). The Attorney General then directed the Federal Bureau of Investigation to determine whether under the statute, as amended, grounds existed for reopening the deportation proceedings against petitioner, and as a result of this investigation a second deportation proceeding was instituted against petitioner on February 14, 1941 (R. 76).[9] The warrant of arrest charged that petitioner was deportable under the provisions of the Act of October 16, 1918, as amended by the Acts of June 5, 1920, and June 28, 1940 (pp. 3–5, *supra*) in that, after entering the United States, he had been a member of or affiliated with

[9] Petitioner was released under bond of $3,000 (R. 76).

an organization (1) that believes in, advises, advocates or teaches the overthrow by force or violence of the Government of the United States; and (2) that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or (3) that has in its possession for the purpose of circulation, distribution, publication, issue or display, written or printed matter advising, advocating or teaching the overthrow by force or by violence of the Government of the United States (Gov. Ex. 1; R. 771–773; 142–143).

Charles B. Sears, a retired judge of the New York Court of Appeals, was appointed an inspector in the Immigration and Naturalization Service of the Department of Justice to preside over the hearings, take testimony, and make appropriate recommendations (R. 76, 141).[10] At

[10] The Regulations of the Immigration and Naturalization Service provide in respect of deportation proceedings that the alien shall be accorded a hearing before an immigrant inspector to determine whether he is subject to deportation on the charges stated in the warrant of arrest, at which hearing the alien is entitled to representation by counsel and to offer evidence in his behalf. As soon as practicable after the hearing has been concluded, the inspector is required to prepare a memorandum setting forth a summary of the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order, which are to be furnished to the alien or his counsel, who may file exception thereto and submit a brief (8 C. F. R. 150.6, 1941 Supp.). Thereafter, the case is heard by the Board of Immigration Appeals, a body in the office of the Attorney General authorized in his behalf to perform his functions in relation to

the hearings before Judge Sears, petitioner's membership in or affiliation with the Communist Party and subsidiaries or allies of the party, notably the Marine Workers Industrial Union, and his membership in the Industrial Workers of the World constituted the conduct claimed by the Government as grounds for petitioner's deportation (R. 144, 147, 799, 807–808).[11] Judge Sears held hearings in San Francisco from March 31 to June 12, 1941, at which the petitioner was represented by counsel and the public and press were admitted (R. 76, 143–145). The evidence covered 44 volumes of 7546 typewritten pages; and, in addition, the Government introduced 297 exhibits, and the petitioner 62 (R. 76, 143–144).

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deportation, but responsible solely to the Attorney General (8 C. F. R., 1940 Supp., 90.2–90.3). If exceptions have been filed, oral argument before the Board is permitted (ibid., 90.5). Where a member of the Board dissents, where the Board certifies that a question of difficulty is involved, or in any case in which the Attorney General directs, the Board must refer the case to the Attorney General for review, and, if the Attorney General reverses the decision of the Board, the Attorney General must state in writing his conclusions and the reasons for his decision (ibid., 90.12).

[11] During the hearings before Judge Sears, the warrant of arrest was amended to include the charge that petitioner was deportable because of his membership in the I. W. W., an organization claimed by the Government to fall within the provisions of subsection (c) of Section 1 of the 1918 Act, as amended, *supra*, p. 3, relating to organizations advising, advocating, or teaching "(3) the unlawful damage, injury or destruction of property, or (4) sabotage" (R. 144).

On September 26, 1941, Judge Sears transmitted to the Attorney General a Memorandum of Decision, analyzing the evidence which had been adduced, and containing proposed findings of fact, conclusions of law and order (R. 76–77, 134–347). Judge Sears found that the Communist Party of the United States of America was "from the time of its inception in 1919 to the present time * * * an organization that believes in, advises, advocates, and teaches the overthrow by force and violence of the Government of the United States;" that it was an organization that "writes, circulates, distributes, prints, publishes, and displays printed matter advising, advocating, or teaching" such overthrow; that it was an organization "that causes to be written, circulated, distributed, printed, published, and displayed printed matter advising, advocating, and teaching" such overthrow; that it was an organization that "has in its possession for the purpose of circulation, distribution, publication, issue and display, printed matter advising, advocating, and teaching" such overthrow; that the Marine Workers Industrial Union "was a part of the Communist Party, dominated and controlled by it" and advocated a similar overthrow of the Government of the United States; and that after entering the United States, petitioner had been a member of the Communist Party and had been affiliated with both the Communist Par-

ty and the Marine Workers Industrial Union (R. 337–338).[12] Accordingly, Judge Sears concluded that petitioner was subject to deportation under the statute involved (R. 338–339) and submitted a proposed order for petitioner's deportation to Australia (R. 340–341). Petitioner filed exceptions to the proposed findings (R. 348–365), and, briefs having been filed, the case was heard on oral argument before the Board of Immigration Appeals (see fn. 10, pp. 9–10, *supra*) on November 24, 1941 (R. 369). On January 3, 1942, the Board rendered an opinion rejecting Judge Sears' proposed findings on the issues of petitioner's membership in or affiliation with the Communist Party and the Marine Workers Industrial Union (R. 367–489), and affirmatively found that petitioner had not been a member of or affiliated with those organizations at any time after he entered the United States (R. 490).

In view of its findings on the issues of membership and affiliation, the Board stated that it was unnecessary to pass upon the issues of whether those organizations were of the nature described in the deportation statute (R. 370–371).

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[12] While Judge Sears in the course of his memorandum stated that petitioner had been a member of the I. W. W. (cf. fn. 11, p. 10, *supra*), for a period of six or seven months beginning June or July 1921 (R. 330), he found, however, that the I. W. W. during that period was not an organization that advocated the illegal destruction or injury of property or circulated documents so advocating (R. 334).

Accordingly, the Board entered an order cancelling the warrant of arrest and closing the proceedings, but stayed execution of the order "pending further order of the Attorney General" (R. 492). The Attorney General reviewed the decision of the Board, and on May 28, 1942, rendered an opinion and decision, in which he made findings in accordance with those proposed by Judge Sears and ordered petitioner's deportation (R. 73–106). Pursuant to the order of the Attorney General, a warrant of deportation was issued May 29, 1942 (R. 62–64), and petitioner surrendered himself to the custody of the respondent on June 2, 1942 (R. 27). On June 4, 1942, the Attorney General denied a petition seeking an opportunity to present argument and briefs to him for the purpose of reconsidering and reversing this decision (R. 678–687).

Petitioner filed a petition for a writ of habeas corpus in the District Court for the Northern District of California on June 2, 1942 (R. 2–17), and an amended petition on July 6, 1942 (R. 21–62). He attacked the legality of his detention on numerous constitutional grounds, claiming that he had not been accorded due process of law in that the deportation order was not supported by substantial evidence (R. 8–10, 53–58) and he had not been given a fair hearing (R. 43–53); that he had been subjected to double jeopardy (R. 11, 39–41); that the 1940 amend-

ment to the deportation statute constituted as to him an *ex post facto* law (R. 11, 41); that he had been denied the equal protection of the laws in that he had been singled out and subjected to discriminatory treatment (R. 12, 28–36); and that the 1940 amendment, providing as a ground for deportation past membership in the described organizations, was an unreasonable limitation of his right to freedom of speech (R. 41–42). Petitioner also asserted that, except for the question of his membership in the I. W. W., the issues in the present deportation proceeding were the same as those in the earlier proceeding before Dean Landis, and those issues having been determined in his favor in that proceeding, the doctrine of *res judicata*, or at least an analogous principle, was applicable (R. 11, 36–39). On February 8, 1943, the district court, in a lengthy opinion (R. 723–759), denied the petition and remanded petitioner to the custody of respondent.[13] On appeal to the Circuit Court of Appeals for the Ninth Circuit, the order of the district court was affirmed (R. 7810), by a vote of three of the five judges

[13] On March 3, 1943, petitioner was admitted to bail by the district court and execution of the order was stayed pending final determination of petitioner's appeal to the circuit court of appeals (R. 763). The mandate of the circuit court of appeals was stayed for three months from September 27, 1944 (R. 7813), and has been further stayed pending final disposition in this Court.

who heard the appeal."[14] The dissenting judges thought that the conclusion that petitioner was a member of or affiliated with the Communist Party was arrived at in reliance upon incompetent evidence received in violation of relevant regulations designed to insure fair hearings and to safeguard the rights of aliens (R. 7794–7809).

The evidence adduced in support of the findings of the Attorney General which are now challenged by petitioner may be summarized as follows:[15]

1. *The finding of petitioner's membership in the Communist Party* (Finding 9, R. 104).—Government witness Lundeberg, Secretary-Treasurer of

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[14] A motion by the Communist Party of the United States of America for leave to intervene was denied (R. 7769). The Communist Political Association has filed a motion in this Court for leave to intervene.

[15] Petitioner does not now challenge the sufficiency of the evidence to support the findings of the Attorney General that the Communist Party and the Marine Workers Industrial Union are organizations within the description of the deportation statute (Findings 3–8; R. 103–104) but states (Pet. 8, footnote) that, if the petition is granted, he will argue that the proof does not justify these findings. The evidence in those respects is summarized in the Memorandum of Judge Sears (R. 157–231) and in the decision of the Attorney General (R. 79–84), and is, we believe, clearly adequate. Excerpts from "The Communist Manifesto" (Gov. Ex. 91, R. 1031–1032), Lenin's "The State and Revolution" (Gov. Ex. 182, R. 1486), and the "Theses and Statutes of the Third (Communist) International" (Gov. Ex. 94, R. 1036–1047) were characterized by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, 153, as lending considerable support to the proposition that the Communist Party advocates the overthrow of the Government by force and violence.

the Sailors Union of the Pacific, head of the Seafarers International Union of North America, Vice President of the California State Federation of Labor, and in 1935 president of the Maritime Federation (R. 7260–7261), testified that in the summer of 1935 he was at petitioner's home through petitioner's invitation, having supper (R. 7264–7265); that among those present were Sam Darcy, an acknowledged Communist, to whom petitioner introduced the witness (R. 7265–7266); and that Darcy, in petitioner's presence, asked Lundeberg to join the Communist Party, stating that petitioner was a member and that if Lundeberg joined the Party, it would build him up as a labor leader (R. 7266–7267). Lundeberg testified that petitioner then said: "You don't have to be afraid because nobody has to know you are a member of the Communist Party if you join" (R. 7267) and "You don't have to be afraid because I am one too" (R. 7268)—"I am a member of the Communist Party" (R. 7339). Petitioner admitted that Lundeberg was at his home in the summer of 1935 (R. 7576) and that he was aware of Darcy's party membership (R. 6091–6092), but denied that Darcy was present at the time (R. 7576–7577) or that he told Lundeberg that he (petitioner) was a member of the Communist Party (R. 7709–7710).

James O'Neil, who had been closely associated with petitioner from 1937 to 1939 as publicity director of the C. I. O. on the West Coast under

petitioner's supervision and who had access to petitioner's office (R. 2993–2994), in a verbal statement made to the F. B. I. on October 7, 1940, said that on one occasion he walked into petitioner's office when petitioner was alone and saw "on his desk * * * a new Party book, which had just been issued and into which Bridges was putting assessment stamps * * * I expressed amazement that he was doing this openly * * *. However, he nonchalantly continued to put the stamps in place and then returned the book to his pocket. I knew this was a Communist Party book because I had one myself * * *. On several occasions Bridges reminded me that I had not been attending Party meetings * * * By this he meant top fraction meetings of the Communist Party" (Gov. Ex. 255, R. 3103–3104, 3145; R. 3109–3110, 3113). These remarks as transcribed by a stenographer present were introduced after O'Neil, called as a witness by the Government, testified that he had never seen petitioner putting assessment stamps in a Communist Party book (R. 2994–2995).[8] Petitioner denied that he ever told O'Neil that he had participated in Communist Party fraction meetings or that he had called to O'Neil's attention that O'Neil had not been attending such meetings (R. 5882–5883).

[8] O'Neil admitted that he was interviewed on October 7, 1940, but denied making the remarks in question (R. 3019–3024, 3076). He also testified that at an interview on April 22, 1941, at which Major Schofield, then Special Assistant to the Attorney General in charge of the Immigration and Naturalization Service (R. 5255) and Mr. Del Guercio, chief

Government witness Kelley, proprietor of the Atwood Hotel in Seattle (R. 1917), testified that while petitioner was at the hotel on May 1, 1937 (R. 1917–1918) he heard one Dietrich say to petitioner at a conversation among the three in Dietrich's room: "Harry, you are one of the swellest guys I have ever known if it wasn't for the Commie outfit that you belong to," and that petitioner replied: "That is all right. You will see the time that you are damned glad to belong to our outfit" (R. 1920). Kelley later asked Dietrich what he had meant and Dietrich responded: "It is the Communists. Didn't you know that Bridges belongs to that outfit?" (R. 1920–1921.) Petitioner did not unequivocally deny having made the statement attributed to him, but testified that, if he did make it, it was

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government counsel, were present, he told them that the statements he had made to the F. B. I. were true and also that what he told Schofield and Del Guercio on April 22nd was true (R. 3032–3036, 3079–3081). He denied, however, that he told Schofield and Del Guercio that petitioner was a Communist and that he had seen him placing stamps in the Party book (R. 3036, 3051–3053). Mrs. Segerstrom, a stenographer in the employ of the F. B. I., testified that she was present at O'Neil's interview on October 7, 1940, and that he dictated a statement which she took down stenographically (R. 3102–3104). She read her stenographic notes of the statement and in these appeared O'Neil's remarks concerning petitioner's putting assessment stamps in a Communist Party book, etc. (R. 3104, 3109–3110, 3113). Schofield testified that at the interview with O'Neil on April 22, 1941, O'Neil stated that he had seen petitioner "pasting dues stamps in Bridges' membership book in the Communist Party" (R. 5255–5256).

not made seriously (R. 5849–5851), while Kelley testified that he was not impressed by the incident at the time it occurred (R. 1937–1938). Government witness Barlow testified that at a convention in Seattle in 1935 of the Maritime Federation of the Pacific petitioner told him "that the only way that a young fellow could get ahead in the labor movement today was to join the Communist Party" (R. 7377). Petitioner denied making this statement to Barlow (R. 7576).

2. *The findings as to petitioner's affiliation with the Communist Party and the Marine Workers Industrial Union* (Findings 10–11, R. 104).—Judge Sears found that the "Waterfront Worker," a mimeographed newspaper published in San Francisco, was an instrument of the M. W. I. U. and the Communist Party from December 1932 until abandonment of the paper in 1936; that petitioner and his group were responsible for its publication during that period; and that this "demonstrates his affiliation with both the M. W. I. U. and the Communist Party, if not actual membership in either, or both, of those organizations" (R. 243–249). These findings the Attorney General accepted (R. 85–90). Four of the five issues of the "Waterfront Worker" published prior to September 15, 1933, expressly acknowledged the assistance of the M. W. I. U. (Gov. Ex. 204, R. 1592, 1591–1603; Gov. Ex. 205, R. 1621, 1638; Gov. Ex. 247, R. 2576, 2575–2593; Gov. Ex. 280, R. 6142–6159). The September 15,

1933, issue and succeeding issues, however, did not make this acknowledgement (Gov. Ex. 248, R. 2595–2618; Gov. Ex. 249, R. 2618–2640; Gov. Ex. 250, R. 2641, 2655; Gov. Ex. 251, R. 2665, 2682; Gov. Ex. 281, R. 6180, 6181; Gov. Ex. 283, R. 6250, 6251; Gov. Ex. 285, R. 6279, 6293; Gov. Ex. 286, R. 6326, 6336). The September 15, 1933, issue described the M. W. I. U. as "the only organization leading the struggles for better conditions" and praised its activities in prompting strikes (Gov. Ex. 281, R. 6180, 6184). In October 1933 the paper advised its readers to vote for Communist Party candidates in the municipal elections in San Francisco (Gov. Ex. 283, R. 6250, 6256, 6270–6274). The paper also recommended the reading of Communist literature in its March and November 1934 issues (Gov. Ex. 285, R. 6279, 6282; Gov. Ex. 286, R. 6326, 6336). In December 1934 it sponsored a meeting to which it invited as speaker William F. Dunne, whom it described as "one of the foremost trade-union authorities in America". (Gov. Ex. 250, R. 2641, 2643). Dunne was a member of the Central Executive Committee of the Communist Party and editor of its official publication, the "Daily Worker" (R. 1500).

The first address of the paper was the headquarters of the Needle Trades Workers Union, a T. U. U. L. affiliate (R. 1559–1561, 6222). The second address was a building occupied by an ad-

mitted Communist, and known by petitioner to be a Communist (R. 6222, 6225–6226; Gov. Ex. 219, R. 2047–2049). The third address was a post office box rented for the paper by an admitted Communist and M. W. I. U. organizer who was closely associated with petitioner (Gov. Exs. 211, 212, R. 1911–1914; R. 6091–6092, 6204, 6231–6242).

In the 1939 hearings before Judge Landis (see pp. 5–8, *supra*), petitioner testified that his group took over the "Waterfront Worker" in September or October 1932, although he was not certain of the exact time (R. 3217, 3231–3232, 3234–3237, 3242–3243). In the instant proceeding, petitioner testified on direct examination that the paper was started by the M. W. I. U. in January 1933, but that his group did not take it over until September 1933 (R. 5761–5764). On cross-examination he testified that the paper was not started until June 1933 and his group did not "first conceive" the idea of taking it over until October 1933 (R. 6160–6161).[17] When shown the September 1933 issue (Gov. Ex. 281), petitioner admitted, however, that this issue was put out by his group (R. 6179). Judge Sears found that the first issue under petitioner's sponsorship was that for December 1932 (R. 241) and the Attorney General accepted Judge Sears' finding (R. 87).

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[17] Petitioner explained that his group consisted of "longshoremen; just the fellows that stood there every morning day in and day out" (R. 6161).

Other additional items of evidence which support the conclusion of Judge Sears (R. 327), in which the Attorney General concurred (R. 100), that petitioner adopted a course of conduct "as an affiliate of the Communist Party, rather than as a matter of chance coincidence" are as follows: Petitioner actively induced seamen to join the M. W. I. U. (R. 6097–6098, 6503–6507). Over the opposition of labor leaders who feared Communist penetration of the labor movement, he unsuccessfully sought to secure the seating of M. W. I. U. delegates on the Joint Strike Committee in the 1934 San Francisco strike (R. 6348). He also opposed, without success, the adoption by the San Francisco Central Labor Council on June 22, 1934, of a resolution disclaiming all connection with Communist organizations, and particularly the M. W. I. U. (R. 6350), and he notified the Communist Darcy before its adoption that such action was contemplated (R. 6351–6352). Petitioner was in frequent contact with well-known Communists (R. 3266–3268, 6091–6092, 6095–6097, 6203–6204, 6353–6354, 6358–6360, 6377–6378, 6450, 6456–6482). On December 16, 1936, he addressed a meeting held in Madison Square Garden in New York (R. 6443). The rental for the Garden had been paid by the treasurer of the Communist Party for the New York District (R. 3488–3493). Government witness Rushmore testified that at an interview with petitioner, petitioner praised the Youth Congress of the Young Communist League, which

was dominated and controlled by the Communist Party (R. 1429–1434). Likewise there is the testimony of Dawn Lovelace, supported by the signed statement of her deceased husband, both of whom were Communists but were not members of a trade union, that in August 1935, petitioner at their apartment, in the presence of the Lovelaces and two other Communist Party members, discussed the contents of a telegram which he proposed to send to an officer of his local union (R. 1949–1951, 1955–1967, 1990–1993, 2002–2003). Petitioner, while admitting that he had been at the apartment, denied discussing the contents of the telegram (R. 5849). He testified that he would not discriminate against union men because of Communist membership (R. 6534–6537), and that he was strongly opposed to "the slander and the publicity that was going on in Los Angeles at that time * * * to the effect that the CIO was a Communist organization" (R. 6028).

There is also the testimony of seven witnesses, all of whom were members of the Communist Party, that petitioner had attended Communist meetings (R. 1545–1559, 1707–1711, 1789–1800, 2158–2167, 2333–2340, 2410–2417, 2520–2525). Petitioner denied attending the meetings described by these witnesses (R. 5840–5841, 5843, 5845, 5853, 5869–5871, 5878, 6003, 6015, 6316, 6430). Judge Sears concluded that their evidence, for various reasons, did not establish petitioner's membership in or affiliation with the Communist

Party (R. 292–317). The Attorney General stated that such evidence "taken as a whole * * * cannot, because of its volume, be completely disregarded" (R. 98).

ARGUMENT

1. *Adequacy of the evidence.*—The controlling statute, Section [illegible] of the Act of February 5, 1917, p. 5, *supra*, provides that the decision of the administrative officers charged with the issuance of deportation orders shall be final. However, it is well settled that though no direct review of such decisions may be had in the courts, a collateral review by way of habeas corpus may be secured to the extent of determining whether the proceeding so lacked the elements of a fair hearing that it can be said that the alien was deprived of due process of law. In such a collateral review, the range of judicial inquiry is closely circumscribed; as this Court said in *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, at p. 106:

> Upon a collateral review in *habeas corpus* proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial.

And in *Tisi* v. *Tod*, 264 U. S. 131, at pp. 133–134, it was said:

> We do not discuss the evidence; because the correctness of the judgment of the lower

> court is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found. * * * mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.[18]

See also *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149; *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Zakonaite* v. *Wolf*, 226 U. S. 272.

We do not understand that the principles laid down by the foregoing cases have in any way been modified by this Court. The petitioner, relying (see Pet. 22–23) upon more recent decisions under the National Labor Relations Act, insists that they have. But it is beside the point, we submit, to argue whether criteria relevant to the statutory form of judicial review provided by the National Labor Relations Act are applicable with equal force to a collateral review confined to the issue of the presence or absence of due process of law. No reliance was here placed by the courts below on the "mere scintilla of evidence" condemned by

[18] The omitted portion of the passage quoted in the text deals primarily with the effect of lack of procedural due process upon the validity of the order. As we contend below, no substantial question of lack of procedural due process is presented in this case; but in any event that is a question separate from the issue of the adequacy of the evidence to sustain the order.

this Court as insufficient to sustain orders of the Labor Board (see *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299–300). The district court concluded in express terms (R. 758) that the order for deportation was made "after a fair hearing on substantial evidence," and Judge Stephens, in his opinion in the court below on denial of petition for rehearing, pointed out specifically (R. 7812) that in both the majority and the concurring opinion "the idea of the mere scintilla was never considered." Both courts below thus held that the order of deportation was supported by "evidence, more than a scintilla and not unbelievable on its face," and that, being so supported, it could not be collaterally impeached in habeas corpus proceedings. In so doing, we believe it clear that they followed applicable principles repeatedly declared by this Court.

With respect to the sufficiency of the evidence to support the order, therefore, we do not believe that any question of law is presented which has not heretofore been unequivocally settled by this Court. In effect, the petition seeks to induce the Court to review the evidence and to determine that by accepted standards it was so inadequate to justify the deportation order that in legal contemplation the petitioner was not accorded a fair hearing. However, the evidence has now been fully considered five times. Judge Sears, the Presiding Inspector, is a noted and

experienced jurist, who before his retirement sat for over twenty years on the New York bench, first as a member of the Supreme Court and later as a member of the Court of Appeals. Both he and the Attorney General regarded the evidence, taken as a whole, as establishing the essential allegations made against petitioner. The two courts below considered that the record at least contained evidence upon which Judge Sears, who saw the witnesses, and the Attorney General were entitled to rely.[19]

In support of the correctness of these conclusions, we respectfully refer the Court to the summary of the pertinent evidence given in our Statement, *supra*, pp. 15–23. After so thorough a process of hearing and review as has been accorded to this case, we submit that the factual issue as to the adequacy of the evidence to support the administrative action taken presents no

[19] Even the Board of Immigration Appeals, which recommended rejection of Judge Sears' findings on the issues of membership and affiliation, did so as an intermediate reviewing body with authority, subject to approval of the Attorney General, to substitute its own judgment for that of the Presiding Inspector. As the courts below held, the Attorney General was fully justified in accepting the views of the Presiding Inspector as to the credibility of witnesses, as against the contrary views of the Board which merely reviewed the written record. Moreover, there is no reason to suppose that the Board would have decided otherwise than did the courts below on the narrower question of due process to which judicial consideration is limited in habeas corpus proceedings.

situation warranting further review by this Court on writ of certiorari.

2. *Procedural due process.*—The petitioner's prayer for a writ of certiorari on the basis of procedural abuses amounting to a denial of due process is, we submit, equally clearly answered by previous decisions of this Court. As the majority of the court below held (R. 7786–7787), neither the principle of *res judicata* nor the constitutional prohibitions against double jeopardy and *ex post facto* laws (see Pet. 27–31) have any place in deportation proceedings.[20] Nor is the scope of these doctrines to be enlarged by attaching them, as petitioner proposes, to the due process clause of the Fifth Amendment. The admission of an alien confers upon him, prior to naturalization, only a license to remain, terminable at the will of Congress. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713; *Chae Chan Ping* v. *United States*, 130 U. S. 581, 609. As has been said (*Tiaco* v. *Forbes*, 228 U. S. 549, 556–557), "sovereign states have inherent power to deport aliens, and * * * Congress is not deprived of this power by the Constitution of the United States." Petitioner's contention misconceives the nature of the deportation power.

[20] *Res judicata: Pearson* v. *Williams*, 202 U. S. 281; *Flynn ex rel. Ham Loy Wong* v. *Ward*, 95 F. (2d) 742 (C. C. A. 1); *White* v. *Chan Wy Sheung*, 270 Fed. 764, 767 (C. C. A. 9). Double jeopardy: *Sire* v. *Berkshire*, 185 Fed. 967, 970–971 (W. D. Tex.); cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 399. *Ex Post Facto: Mahler* v. *Eby*, 264 U. S. 32, 39; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591.

There is no merit in the suggestion of illegal discrimination against petitioner (Pet. 26–27, 32) in the amendment of the deportation statute following the first hearing before Dean Landis, and in the claimed failure of the authorities to proceed against other aliens on the basis of affiliation with the M. W. I. U. That Congress may be moved to the enactment of general legislation for particular reasons or for the correction of particular abuses which have been brought to its attention is too clear to require argument; and even if the due process clause may embody the equivalent of an equal protection clause (but see *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 468; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401), there is no basis in authority for the theory that failure of enforcement officers to proceed against others within the reach of a statute constitutes a denial of the equal protection of the laws to one against whom proceedings are otherwise properly instituted under the same statute.[n]

[n] It should be noted that in any event affiliation with the M. W. I. U. is not the sole basis for the deportation order. The findings as to petitioner's membership in and affiliation with the Communist Party are not dependent upon the evidence of his affiliation with the M. W. I. U., and are separately supported by the evidence. Since deportation was mandatory if any one of the charges should be sustained, there is no room for the doctrine, often applied in judicial review of administrative orders, whereby an administrative body after partial judicial correction is afforded an opportunity to reconsider its action in the light of correct principles.

Petitioner's further objections (Pet. 33–40) to claimed abuses in hearing procedure likewise raise no issue warranting review by this Court.

(a) The evidence as to the witness O'Neil's prior statements was at most cumulative, and even on the theory that its reception was improper, the court below correctly declined to invalidate the order merely because of acceptance of this "additional evidence of less probative value" (R. 7789). Moreover, there was no error, flagrant or otherwise, in accepting the evidence. Whatever may be the rule in judicial proceedings, in exclusion and deportation proceedings prior contradictory statements may be used not only for impeachment purposes, but also as substantive evidence.[22] No right of cross-examination was defeated; the petitioner was given full opportunity to cross-examine the Government witnesses who testified to the prior inconsistent statements, and to cross-examine O'Neil himself as to the circumstances of the interviews which, in spite of his denial of the statements attributed to him, he admitted had taken place (R. 3019–3024, 3076; 3032–3036, 3079–3081). Nor, contrary to petitioner's assertion (Pet. 34–35), was the reception of the statements in violation of the rules of the Immigration and Naturalization Service. Rule

[22] *United States ex rel. Ng Kee Wong* v. *Corsi*, 65 F. (2d) 564, 565 (C. C. A. 2); *Ex parte Ematsu Kishimoto*, 32 F. (2d) 991 (C. C. A. 9); *Johnson* v. *Kock Shing*, 3 F. (2d) 889, 890 (C. C. A. 1).

150.1 (c) (8 C. F. R., 1941 Supp., 150.1 (c)), upon which petitioner relies, is merely directory of the procedure to be followed during the course of an investigation prior to the issuance of a warrant, to the end that warrants shall not be issued unless "there is credible evidence reasonably establishing (1) that the person investigated is an alien, and (2) that he is subject to deportation." Rule 150.1 (b) (8 C. F. R., 1941 Supp., 150.1 (b)). Rule 150.6 (i) (8 C. F. R., 1941 Supp., 150.6 (i)), on the other hand, which deals with hearings as distinct from investigations, specifically recognizes the right of an immigration officer to testify as to statements made to him, and in no way restricts his testimony. The testimony of Major Schofield and Mrs. Segerstrom (see note 16, *supra*) as to prior inconsistent statements made by O'Neil in their presence can scarcely be rendered inadmissible by the fact that it was supported by a stenographic record contemporaneously taken and authenticated to the satisfaction of the Presiding Inspector (R. 270).

(b) The charges of misconduct on the part of Government counsel during the course of the hearing (Pet. 36–37) rest, in part at least, on distortion of the record. Upon only one occasion was a request made for production of a prior statement by a witness, and on that occasion the record shows that Government counsel had no such statement had never seen it, knew nothing about it,

and merely declined to make further inquiry as to the fact of its existence (R. 1360–1362). The charge regarding the presentation of false testimony by one Cannalonga was characterized by the court below as an "aspersion upon the integrity of the Government's attorneys—wholly gratuitous and without foundation in fact" (R. 7793). And a charge of wire-tapping following completion of the hearing, even if established, is so patently irrelevant to any issue of due process in connection with the hearing as to deserve no serious consideration.

(c) There is no substance to the charge that petitioner was deprived of due process by the action of the Attorney General in overruling the determination of the Board of Immigration Appeals without according an opportunity to petitioner to present written or oral argument. The Regulations make no provision for oral or written argument before the Attorney General;[23] and no principle of due process requires them. Oral argument as such is not essential to a fair hearing. *Morgan* v. *United States*, 298 U. S. 468, 481. Written (as well as oral) argument was fully made before the Presiding Inspector and the Board; and the Attorney General had before

[23] Rule 90.12 of the Regulations (8 C. F. R., 1940 Supp., 90.12) provides merely that the Attorney General "will state in writing his conclusions and the reasons for his decision."

him not only the written conclusions of these respective hearing officials, but also the briefs of the parties filed with them. Since petitioner's objections to the findings and conclusions recommended by the Presiding Inspector were fully developed in his brief before the Board, as well as in the Board's own opinion which accepted petitioner's objections, the Attorney General had before him at the time of his decision all material necessary to a complete understanding of petitioner's contentions. Petitioner complains (Pet. 38–39) that the Attorney General in accepting the proposed findings of the Presiding Inspector advanced considerations in support of such findings which had not previously been urged by the parties; but it is a commonplace of judicial procedure that once the issues have been clearly posed by actual or proposed findings below, neither a court nor an administrative tribunal is confined to the arguments of counsel in stating on review the reasons for its decision whether to accept such findings.

3. *Constitutionality of the deportation statute.*—Petitioner contends (Pet. 40–51) that the deportation statute as construed and applied to him violates rights of freedom of speech and association guaranteed to him by the First and Fifth Amendments. We believe that this question also is settled against him by prior decisions of this Court. "It is thoroughly established that Con-

gress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination * * * is simply a refusal by the Government to harbor persons whom it does not want." *Bugajewitz* v. *Adams,* 228 U. S. 585, 591. Naturalization may be denied to an alien on the ground of utterances, beliefs, or associations for which, by the protection of the First Amendment, he could not be punished (*United States* v. *Schwimmer,* 279 U. S. 644; *United States* v. *Macintosh,* 283 U. S. 605); and it would seem that the sovereign power of deportation (*Tiaco* v. *Forbes,* 228 U. S. 549, 556) would be subject to no greater restraint. *Turner* v. *Williams,* 194 U. S. 279; *United States* v. *Parson,* 22 F. Supp. 149, 154–155 (S. D. Cal.). The *Turner* case, like the case at bar, dealt with what may generally be described as civil liberties; and although, as petitioner points out (Pet. 44), it involved the deportation of an illegal entrant, it has been regarded as authority for the broad scope of the deportation power without any special reference to this asserted distinguishing factor. See *Tiaco* v. *Forbes,* 228 U. S. 549, 557; Douglas, J., concurring, in *Schneiderman* v. *United States,* 320 U. S. 118, at 165. The petitioner cites the doctrine of unconstitutional conditions (Pet. 43–44); but whatever the effect of this doctrine upon the civil rights of a resident alien in his status as such (cf. *Wong Wing* v. *United States,* 163 U. S.

228), we doubt that it extends to protect him against the orderly termination of that status for whatever reasons may seem to Congress necessary or desirable in the public interest. We know of no case in which this Court has denied or suggested limitations upon the plenary authority of Congress to determine the grounds upon which an alien may be deported.

Nevertheless, while we believe that a conclusion in favor of the constitutionality of the deportation statute in its present application flows directly from the previous relevant decisions of this Court, we know of no case in which this Court has squarely passed upon the precise question presented under Point III of the petition. Furthermore, the great number of aliens now lawfully resident in the United States lends importance to the issue involved. Therefore, we do not feel warranted in opposing the issuance of a writ of certiorari to review the decision of the court below in so far as that decision sustained the constitutionality of the deportation act as construed and applied in this case.

CONCLUSION

The petitioner's contentions with respect to the adequacy of the evidence to support the deportation order of the Attorney General, and with respect to asserted denial of due process in the institution and conduct of the deportation proceed-

ing, present no issues warranting further review by this Court. If this Court should regard the constitutional question presented by Point III of the petition as being sufficiently in doubt to justify the issuance of a writ, we believe that the writ should be limited to that question.

Respectfully submitted.

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